

E-Filed 8/19/2008

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BEVERLY THORP,

Plaintiff,

v.

JUDGE ROBERT ATTACK,¹

Defendant.

Case Number C 08-1449

ORDER² DENYING PLAINTIFF'S
MOTION FOR DEFAULT
JUDGMENT AND GRANTING
DEFENDANT'S MOTION TO
DISMISS

Plaintiff Beverly Thorp ("Thorp") brings this action against Santa Cruz Superior Court Judge Robert Attack ("Judge Attack"), alleging a violation of her due process rights and asserting claims pursuant to the Uniform Commercial Code ("UCC"). Thorp moves for default judgment, and Judge Attack moves for dismissal.³ For the reasons set forth below, the motion for default

¹ The Court takes judicial notice of the correct spelling of Judge Robert Attack's name.

² This disposition is not designated for publication in the official reports.

³ Thorp also filed a motion for summary judgment on June 10, 2008, requesting that it be heard on June 20, 2008. Because Thorp's request did not comply with the briefing schedule set forth in Civil Local Rule 7-9, the Court did not allow the parties to argue the motion for summary judgment at the June 20 hearing, and it will not be addressed in this order.

1 judgment will be denied, and the motion to dismiss will be granted without leave to amend.

3 I. BACKGROUND

4 Thorp alleges the following. Thorp was a party in *Sys.& Serv.Techs. Inc. v. Thorp*, No.
5 CV 155983, a state court proceeding heard in the Santa Cruz Superior Court. Judge Attack
6 presided over that action after Judge Paul Burdick was disqualified. Thorp alleges that Judge
7 Attack failed to review the facts presented to him and “refused to accept irrefutable evidence in
8 the case.” Complaint at 13. Thorp also asserts that Judge Attack’s rulings were “void and that
9 fraudulent” and consequently that she was deprived of her personal property despite the fact that
10 she was never charged with any offense or crime.⁴ Thorp requests that the Court: (1) disqualify
11 Judge Attack immediately and permanently;⁵ and (2) declare all of Judge Attack’s rulings and
12 judgments to be null and void. Complaint at 30.

13 II. LEGAL STANDARD

14 For purposes of a motion to dismiss, the plaintiff’s allegations are taken as true, and the
15 Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*
16 *McKeithen*, 395 U.S. 411, 421 (1969). Leave to amend must be granted unless it is clear that the
17 complaint’s deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*,
18 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be
19 ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

20 III. DISCUSSION

21 1. Default Judgment

22 Thorp claims that she properly served Judge Attack by sending a copy of the summons
23 and complaint via certified mail to the Santa Cruz courthouse and that Judge Attack did not

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25 ⁴ Thorp also alleges that “Judge Attack has violated so many laws, it would take me a
ream of paper just to list them.” Complaint at 13.

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27 ⁵ Although Thorp states in her opposition papers that final judgment was rendered in
28 2007, she requests that Judge Attack be disqualified because she will not be able to receive a fair
hearing or trial before him.

respond in a timely manner.⁶ Judge Attack contends that this method of personal service is invalid as it does not conform with the requirements of either F. R. Civ. Pro. § 4(e) or C.C.P. §§ 415.10 *et seq.* The Court concludes that it has insufficient information to permit it to resolve this issue on the merits. For example, Thorp has failed to indicate whether she exercised reasonable diligence to serve Judge Attack in person or by mail to his usual place of abode. Thorp also has failed to specify whether she brings this action against Judge Attack in his individual or official capacity. Neither party has provided information as to whether Thorpe served two copies of a notice and acknowledgment of service in accordance with C.C.P. §415.30 or as to whether Judge Attack returned an acknowledgment of service as required for complete service under Cal. Civ. Pro. §415.30. When service of process is challenged, the party on whose behalf service was made has the burden of establishing its validity. *See, e.g., Hope v. Otis Elevator Co.*, 389 F. Supp. 2d 1235, 1242 (E.D. Cal. 2005); *Hickory Travel Systems, Inc. v. TUI AG*, 213 F.R.D. 547, 551 (N.D. Cal. 2003). Because Thorp has not met this burden, her motion for default judgment will be denied.

2. Motion to Dismiss

Pursuant to Rule 12(b)(6), a district court must dismiss an action if it lacks jurisdiction over the subject matter of the lawsuit. The relief sought by Thorp in this case is a declaration that all of Judge Attack's rulings and judgments are null and void.⁷ However, with the exception of habeas corpus petitions, federal courts lack jurisdiction to review final state court judgments. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). "[A] losing party in state court is barred from seeking what in substance would be appellate review of the state judgment in United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal

⁶ Judge Attack filed the instant motion on April 18, 2008, more than thirty days after the alleged date of service.

⁷ At oral argument Thorp stated that she is not seeking to appeal Judge Attack's rulings but rather to challenge the judge's conduct. However, her complaint specifically seeks invalidation of the judge's rulings.

rights.” *Bennett v. Yshima*, 140 F.3d 1218, 1223 (9th Cir. 1998) (quoting *Johnson v. DeGrady*, 512 U.S. 997, 1005-06 (1994)).

Thorp also requests that this Court disqualify Judge Attack. This is not a viable claim for relief in federal court, and in any event Judge Attack is immune from suit for his judicial acts.

Bradley v. Fisher, 80 U.S. 335 (1971). The Supreme Court has explained:

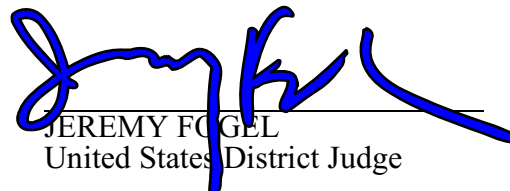
Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigant. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to imitation.

Pierson v. Ray, 386 U.S. 547, 554 (1967) (internal quotations and citations omitted).

IV. ORDER

While ordinarily the Court views the pleadings of a pro se litigant with great liberality, *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 623 (9th Cir. 1988), it is apparent both from the complaint and from Thorp’s responses to the Court’s questions during oral argument that the instant suit is directed entirely toward Judge Attack’s handling of Thorp’s state court case. Because Thorp does not and cannot allege that Judge Attack acted in the complete absence of jurisdiction, any amended complaint also would be barred by the doctrine of judicial immunity. Accordingly, IT IS HEREBY ORDERED that the motion to dismiss is GRANTED without leave to amend. The clerk shall enter judgment and close the file.

DATED: August 19, 2008


JEREMY FOGEL
United States District Judge

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1 This Order has been served upon the following persons:

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